Kentucky Law Journal

Volume 81 | Issue 4 Article 14

1993

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The Mediation Alternative

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INTRODUCTION

Due to the increased interest in the possible uses and applications of alternative dispute resolution ("ADR") processes in the past decade, the term "mediation" has become part of standard legal terminology. Developments in legal curricula have enabled an entire generation of legal professionals to participate in courses of study that explore alternative methods of conflict management and resolution. These alternative methods transgress the traditional means of addressing disputes through negotiation and litigation. These changes and developments are indicated by a change in vocabulary employed by both law schools and law students. For example, the vocabulary in an increasing number of law schools now includes phrases such as "alternative dispute resolution continuum," "best alternative to a negotiated settlement," and "neutral third party."[1] Similarly, the law school graduate's lexicon now includes terms such as "principled negotiations," "neutral evaluation," and "minitrial." Furthermore, the American Bar Association's Standing Committee on Dispute Resolution has recently become a full section of the Association. What was once a "movement" has evolved into a permanent part of the legal culture in the United States.[2]

In many legal communities, tensions exist between those who have embraced the "message" espoused by ADR proponents and those who proceed more cautiously in adopting ADR procedures. This tension becomes evident in negotiations between the more cautious members of the legal community and the enthusiastic supporters of the dispute resolution field as they wrestle with ways to provide ADR services in a

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[1] *See* ABA STANDING COMMITTEE ON DISPUTE RESOLUTION DIRECTORY OF LAW SCHOOL DISPUTE RESOLUTION COURSES AND PROGRAMS (1989).

[2] *Effort Underway to Form Section to Address ADR Issues*, A.B.A. J., June 1992, at 112.

particular area. This tension also becomes apparent when a mediator, who is a trained legal professional, has "changed hats," acting as a neutral third party. A neutral in ADR vocabulary is a professional trained in one or more ADR processes who utilizes his or her status as a "disinterested third party to assist in the resolution of disputes" by employing conflict management skills.[3]

An attorney can assume a neutral role in several different dispute resolution processes such as arbitration, fact-finding, or evaluation. However, some of the most compelling issues arise when the attorney is acting as a neutral third party mediator. In examining the role of the neutral lawyer as mediator, this Article will address the following: the effect of the operative definition of the mediation process on the role of the lawyer-mediator; the different capacities in which lawyer-mediator can function in the ADR field; and the unique perspectives a lawyer-mediator brings to the field of mediation.

I. UNDERSTANDING THE MEDIATION PROCESS

In examining issues relevant to lawyer-mediators, it is essential to formulate an operative definition of mediation. Because of the general misconceptions surrounding the concept of mediation, it is useful to describe what mediation is *not*. Mediation is not a substance prescribed by a physician to aide in the healing process–that is medication. It is not the practice of sitting in lotus position and reciting a mantra–that is meditation. It is not a group of people sitting in a dark room holding hands around a candle-laden table and attempting to contact the spirit world–that is using a medium. Although these are examples of what mediation clearly is not, I have received requests for all of the above services through my office, demonstrating that there is a vast misunderstanding among the general public about what the mediation process is about.

Unfortunately, many members of the legal community do not have a better understanding of the mediation process than the people who contacted my office requesting the above services. It is no longer uncommon for a judge to order disputants to participate in a mediation process. Often included in this order are instructions for the mediator to report his or her recommendations or findings to the court. It is, therefore, becoming increasingly important that attorneys familiarize themselves with mediation and other alternative dispute resolution systems.

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[3] SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, MAKING THE TOUGH CALLS: ETHICAL EXERCISES FOR NEUTRAL DISPUTE RESOLVERS 6 (Anne B. Thomas ed., 1991) [hereinafter MAKING THE TOUGH CALLS].

Moreover, attorneys who do not fully understand the mediation process themselves often incorrectly advise or completely fail to advise their clients of the potential usefulness of the mediation process. Although the attorney's incomplete understanding of the mediation process often accounts for his or her failure to discuss mediation as an alternative, this reluctance to refer clients to mediation frequently has other roots. One attorney, who is active in the area of ADR, observed that these reasons include: (1) client expectations that the lawyer will assert their position without any perceived compromise; (2) inadequate skill level on the part of the attorney in addressing the emotional, as well as the legal, issues; (3) "ego investment" of the lawyers desiring to achieve a result that comports with the client's stated goals even though such a result may not satisfy the client's underlying interests; and (4) fear that the suggestion of mediation is merely a strategy rather than a sincere attempt at settlement.[4]

Although I have encountered attorneys who have attempted to address the above issues, and have done so effectively, the majority of the attorneys with whom I work resist mediation for one or more of the above reasons. I have seen attorneys maneuver otherwise willing participants, with much to gain from a nonadversarial process, away from mediation. I have seen attorneys refuse to forego the adversarial process, even for a short time, the result being that their clients are forced into the uncomfortable and inefficient position of simultaneously preparing for a hearing and attempting to reach a mediated resolution on the same issues. I do not believe that it is a coincidence that the most successful mediation cases I have seen are those in which the participants are NOT represented by attorneys during the orientation session. After the orientation session, equipped with a better understanding of what they might need in legal counsel, these participants are better able to select an attorney to represent them throughout the mediation process. Armed with this understanding of what type of counselor is needed, they can choose an attorney who, in addition to providing essential legal advice, will support, rather than sabotage, their efforts to achieve resolution of their disputes with dignity and in a way that makes the experience an opportunity for growth.

Another obstructive perception of mediation in the legal community is the characterization of the process as being "weak" or "wimpy." As law professor Leonard Riskin has asserted:

> I am talking about the intersection of two different ways of looking at human relations. Mediation thrives on a perspective that gives significance

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[4] Marguerite Millhauser, *The Unspoken Resistance to Alternative Dispute Resolution*, 3 NEGOTIATION J. 29, 32 (1989).

> to "human," non-material values such as trust, respect, love and caring, and builds upon commonalities and interconnections. Conversely, most lawyers employ an adversarial perspective–based upon the "lawyer's standard philosophical map"–which stresses protection, separation and material values.[5]

I have often felt that other lawyers view my approach to assisting clients as quaint, at the very least, and ideologically impractical at best. I believe, as Riskin emphasizes, that lawyers who understand the mediation process and integrate this understanding with the traditional practice of law do have a valuable service to offer clients.

As alluded to previously, practicing attorneys frequently claim that their clients are not interested in the mediation process. However, it is often difficult to discern whether the reluctance of clients to engage in mediation is generated by the client's desire to engage in an adversarial legal proceeding or if the reluctance stems from the attorney's explanation and perception of the process. Evidence suggests that the answer lies within the latter. The National Institute for Dispute Resolution ("NIDR") found in its 1992 study of the public's view of ADR processes that the more accurate information people had about ADR processes, the more likely they were to make use of ADR processes. The NIDR survey reported:

> After explaining the distinctions between litigation, mediation, and arbitration, respondents were to imagine being in a dispute with someone while having hired a lawyer. The lawyer offered three options: go to court, go to an arbitrator, or go to a mediator.
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> After learning about the responsibilities and duties of an arbitrator and a mediator, respondents show a strong inclination to use these two methods over the formal litigation process. Overall, 62% say they are

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[5] Leonard L. Riskin, *The Special Place of Mediation in Alternative Dispute Resolution*, 37 U. FLA. L. REV. 19, 27 (1985) (footnotes omitted) (citations omitted). In Riskin's 1982 article, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-44 (1982), he stated:

> The philosophical map employed by most practicing lawyers and law teachers, and displayed to the law student–which I will call the lawyer's standard philosophical map–differs radically from that which a mediator must use. What appears on this map is determined largely by the power of two assumptions about matters that lawyers handle: (1) that disputants are adversaries–i.e., if one wins, the others must lose–and (2) that disputes may be resolved through application by a third party, of some general rule of law. These assumptions, plainly, are polar opposites of those which underlie mediation: (1) that all parties can benefit through a creative solution to which each agrees; and (2) that the situation is unique and therefore not to be governed by any general principle except to the extent that the parties accept it.

Id. (footnotes omitted) (citations omitted).

> likely to go to a mediator–32% somewhat likely; 30% very likely. Over half (54%) would likely go to an arbitrator, and only about one-third (34%) would be likely to go to court.
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> . . . .
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> Upon conclusion of the interview, a sound majority (82%) of the respondents said they would be likely to use an arbitrator or mediator instead of going to court the next time they get into a dispute with someone.[6]

It is therefore apparent that those who understand the mediation process are interested in employing it as an alternative.

In addition to the fallacies linked with the understanding and usage of the mediation process, the practice of mediation is also frequently the victim of misinterpretation. For instance, contrary to popular belief, it is not mediation when two attorneys and their clients meet to discuss possible settlement of a dispute, because a neutral third party is not present. In this situation neither lawyer is acting as a mediator because each is representing his or her respective client. This process is most appropriately described as lawyer-assisted negotiation, which often, but not always, makes use of a cooperative negotiation style. The practice of mediation is not lawyering, counseling, or negotiating, nor is it adjudication, arbitration, evaluation or reconciliation. For me and many others mediation is a distinct profession.

II. FROM A PRACTITIONER'S VIEW

It has been challenging to work with clients and attorneys who have a limited understanding of, and support for, the mediation process. On the other hand, I have had numerous occasions to work with clients who are involved in the mediation process because of, or at least with, their attorney's encouragement. These clients have a real desire for the process to be successful. During the course of my work, many questions have been posed about the role of lawyer as mediator. Of particular significance have been questions involving issues such as impartiality, confidentiality, and qualifications of lawyer-mediators.

A. The Role of Impartiality

Impartiality is key to the mediator's role. It is paramount that the mediator maintain objectivity and the appearance of impartiality

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[6] THE NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, NATIONAL SURVEY FINDINGS ON: PUBLIC OPINION TOWARDS DISPUTE RESOLUTION 4-5 (1992).

throughout the mediation process. The Society of Professionals in Dispute Resolution ("SPIDR"), in its Ethical Standards of Professional Responsibility, defines mediator impartiality as "freedom from favoritism or bias either by word or by action, and a commitment to serve all parties, as opposed to a single party."[7] Mediator impartiality is requisite in all aspects of the mediation process, from the arrangement of the furniture in the mediation area to the mediator's use, or decision not to use, "positionalizing" statements, such as, "Ms. X, tell me your side of the story." Because of the importance of impartiality, it is essential that the mediator continually assess his or her actions throughout the mediation process.

B. The Role of Confidentiality

Confidentiality is also crucial to mediation. Parties to a dispute are usually more willing to work cooperatively when an atmosphere of privacy and discretion exists. SPIDR articulates the importance of confidentiality to the mediation process as follows:

> Maintaining confidentiality is critical to the dispute resolution process. Confidentiality encourages candor, a full exploration of the issues and a neutral's acceptability. There may be some types of cases, however, in which confidentiality is not protected. [Such as in statutory requirements to report allegations of suspected child abuse.] . . . Except in such instances, the neutral must resist all attempts to cause him or her to reveal any information outside the process.[8]

Unlike the litigious dispute resolution process in which confidentiality is limited primarily to the attorney-client realm, and the court proceedings are accessible to the public, confidentiality within mediation includes dialogue between the disputing parties themselves and between the mediator and the parties. In the absence of a statutory provision to protect this confidentiality, many mediators routinely request that the parties sign an agreement that they will neither call the mediator to testify in subsequent litigation on the subject of the mediation nor subpoena any of the mediator's records. Confidentiality is fiercely protected in mediation so that the disputing parties may speak frankly and uninhibitedly with the mediator.

Because of my strong feelings about impartiality, confidentiality and mediator qualifications, and because of my strong belief in the integrity

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[7] MAKING THE TOUGH CALLS, *supra* note 3, at 9.

[8] *Id.* at 16.

of the mediation process, I have developed standards of practice for myself so that I can offer a high quality service to those who could benefit form my lawyer-mediator role. One of the most critical issues in my practice over the years has been that of the most appropriate way to conclude the mediation. When the parties have reached full agreement, the conclusion is simple–I draft a Memorandum of Agreement and give it to the parties. Similarly, with partial agreement, I list such agreements, and the areas which remain unresolved. But what about those unresolved issues? What is the mediator's role when there has not been any agreement by the parties? I believe that the mediator must not be involved in any process after the mediation ended which would require the mediator to evaluate the parties or to reveal information obtained during mediation. However, judges in my region routinely ask for such reporting by "mediators." In order to address this issue, I have instituted a practice of working with a professional who will be able to provide the court with the information desired, after an independent investigation, without compromising the mediation process.

A related question regarding confidentiality is operative when a particularly difficult issue is present in the mediation, and there are numerous professionals involved in assisting the parties. I routinely work with families in which each parent has an attorney, each parent has a counselor, and the children have a separate counselor. In a particular case, the key issue was the role of spanking in the discipline of the children. Was the spanking actually child abuse? The Cabinet for Human Services had completed its investigation, and was not pursuing the matter, but the level of fear and mistrust between the parties was so high that the issues of custody and visitation remained unresolved. Through the use of an interdisciplinary co-mediation team, the parties were able to bring all of the information from the various professionals with whom they had been involved, into a private, safe environment designed to prevent the conflict from escalating, as would have undoubtedly happened had this dispute continued through the court system.

In another case, one attorney told me before the mediation began that this case would not be appropriate for mediation because of the "nature of the issue" causing difficulty. However, the parties seemed to welcome a forum in which to talk with one another about how to care for their child, even though the question of the paternity of a second child was as yet unanswered. I believe the mediator's capacity to impartially assist the parties in managing the systems in which they are involved, as well as the volume of information they must process, is an extremely valuable service.

C. *The Required Qualifications*

Unlike the practice of law, which has very specific requirements for practice, mediators are not governed by a unified set of regulations. As a result of controversy within the field over who should be allowed to mediate, most of the national professional dispute resolution organizations, along with many state and municipal governing bodies, are currently developing position papers and direct legislation which addresses the establishment of mediator qualifications.

SPIDR is one of the national organizations that is currently examining realistic and practical approaches to mediator qualifications. In a report outlining its recommendations for qualifications, the SPIDR Commission on Qualifications first identified the purposes of setting criteria for individuals to practice as neutrals. The purpose of such regulations is to protect the consumer and to protect the integrity of various dispute resolution processes.[9] However, the Commission noted, concerns have been raised about mandatory standards or certification that would create inappropriate barriers to entry into the field, hamper the innovative quality of the profession, and limit the broad dissemination of peacemaking skills in society.[10] The Commission asserted that:

> Perhaps the most pragmatic reason for SPIDR to address the issue of qualifications is that minimum requirements for neutral practice already are being set by legislative, judicial, and administrative bodies. As a leading professional association of neutrals in all fields, SPIDR has a substantial degree of expertise on which these bodies can draw.[11]

In determining how best to promote competence and quality in the practice of dispute resolution, the SPIDR Commission on Qualifications considered several policy options. These included reliance on the free market, disclosure requirements, rosters of information regarding neutrals, ethical codes, mandatory standards for neutrals and for programs, and improvements in training, including enhanced opportunities for apprenticeships.[12] After weighing these options, the Commission adopted three central principles that recognize the need to strike an appropriate balance between competing concerns. These are:

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[9] COMMISSION ON QUALIFICATIONS, SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, PRINCIPLES CONCERNING QUALIFICATIONS (1989).

[10] *Id.*

[11] *Id.*

[12] *Id.* at 10-14.

> A. that no single entity (rather, a variety of organizations) should establish qualifications for neutrals;
> B. that the greater the degree of choice the parties have over the dispute resolution process, program or neutral, the less mandatory should be the qualification requirements; and
> C. that qualification criteria should be based on performance, rather than paper credentials.[13]

Yet, generally speaking, mediators providing services to courts (commonly referred to as "court-referred" or "court-annexed" programs) are required to have obtained at least a master's degree. Many in the mediation field find this requirement irrelevant to the competent practice of mediation. As the SPIDR report maintains:

> The Commission knows of no evidence that formal degrees are necessary to competent performance as a neutral. Indeed, there is impressive evidence that some individuals who do not possess these credentials make excellent dispute resolvers. Furthermore, the requirement of a graduate degree in any discipline clearly creates a significant barrier to the entry of many competent individuals into the profession.[14]

As a result, SPIDR issued four recommendations to be used as criteria for selection training of mediators. First, selection qualifications should be based on experience and ability. Academic degrees should not be a prerequisite for service as a neutral. Rather, qualification criteria, whether mandated by public bodies or adopted voluntarily by private agencies, should be based on individual capabilities, emphasizing the knowledge and particular skills necessary for competent mediation.[15] Second, policy makers should adopt performance criteria and incorporate performance-based testing into training and apprenticeship programs.[16] Third, trainers must be qualified. To enhance the quality of training for neutrals, those offering such training should establish qualifications for their trainers, emphasizing knowledge of, and competency to practice in, the area for which the training is offered, the ability to teach others, and the ability to evaluate the performance of others in simulated settings.[17] Fourth, neutrals should be required to participate in continuing legal education programs. To ensure continued competency in

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[13] *Id.* at 14.
[14] *Id.* at 18-19.
[15] *Id.* at 19.
[16] *Id.* at 19-22.
[17] *Id.* at 23.

this new and changing field entities that sponsor neutrals, and the neutrals themselves, have a continuing obligation to improve their skills through additional training, practice and study.[18]

I have included this extensive excerpt on qualifications, because I believe there is misunderstanding about what a mediator must know and must be able to do. I am amazed at the number of attorneys who believe that a legal degree, trial practice experience or particular knowledge in the substantive area of law involved is required for a mediator to successfully assist parties in resolving their disputes. As the SPIDR guidelines emphasize, performance is the most appropriate criteria. Similarly, I am surprised when I observe some lawyer-mediators go beyond what I believe is their role and interpret the applicable law and perhaps state what they think is likely to happen if a particularly case appears before a judge. In my practice, I am constantly encouraging my mediation participants to seek information from their legal counsel, or involving legal counsel in the mediation itself so that this information can be adequately considered in the parties' decision-making process. It appears to me that an over-reliance on the lawyer-mediator's role as a lawyer does not allow the mediator role to be as effective in achieving the desired result.

III. HOW I CHOSE MEDIATION

In 1982, as a second-year law student at the University of Denver Law School, I was becoming increasingly disillusioned with the legal profession and its emphasis on the adversarial approach to dispute resolution. One day I noticed an advertisement from one of the law school professors seeking a research assistant to aid him in developing an ADR course entitled, "Mediation: Law and Practice." I applied and was granted the position and was soon exposed to the materials of some of the leading scholars, practitioners, and advocates in the burgeoning ADR field, including the pioneering work of Leonard Riskin and Robert Bronstein. Through my study of the expanding field of ADR, I realized that this area was the most fertile ground for the lawyer to serve as a healer, rather than a promoter of conflict. The reason I chose to attend law school was that a legal education would equip me with the skills to provide equitable and humane methods of conflict resolution. As a result of my exposure to this new field, this faith was finally confirmed.

After completing law school and finding no mediation opportunities available, I entered a general law practice, sporadically conducting

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[18] *Id.*

mediations. I rapidly reached the conclusion that my gratification derived primarily from working within the problem-solving modality of mediation and at that point I ended my law practice and began a full-time mediation practice as an attorney-mediator.

I often reflected upon the exposure I received in law school about ADR and yearned to provide other law students with the opportunity to familiarize themselves with ADR while they were still engaged in their legal education. I therefore accepted an offer to instruct students in ADR at the Northern Kentucky University's Salmon P. Chase School of Law, where I have been able to witness firsthand the nationwide shift in the legal curriculum as it broadens to embrace ADR processes.

While my classes have not resulted in any major cathartic experiences in my students, I once had a student who was clerking with a law firm inform me that the firm routinely began its initial client consultations with the question, "Do you want money or blood?" The student agreed wholeheartedly with the firm's adversarial position and was skeptical of the potential effectiveness of ADR's cooperative approach. Unfortunately, he was not the only student who harbored misgivings about ADR. By the end of the course, though, he, along with many of his classmates, began questioning the long-term advantages of the adversarial "money or blood" approach. My teaching was, and is, rooted in the philosophy articulated by Nolan-Haley and Volpe:

> Teaching mediation in law school gives us the opportunity to move students beyond the adversarial practice mode to realize the potential for collaboration and cooperative problem solving. We try to give students a framework within which to practice what Derek Bok has called "the gentler arts of reconciliation and accommodation." This is not a "soft" approach to the practice of law but rather a recognition that in most situations lawyers will best advance their clients' interests by understanding not only the clients' needs but those of the "adversary," and then by trying to respond to those needs.
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> Teaching mediation as a lawyering role helps students develop a more comprehensive theory of lawyering than they might have otherwise acquired.[19]

Whether a lawyer continues in a traditional representational role or chooses to change hats at times to become a lawyer-mediator, he or she

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[19] Jacqueline M. Nolan-Haley & Maria R. Volpe, *Teaching Mediation as a Lawyering Role*, 39 J. LEGAL EDUC. 571, 579, 580-81, 585-86 (1989) (footnotes omitted) (citations omitted).

can make a vital contribution to the developing field of mediation. This contribution can be in the form of simply gaining an understanding of the mediation process and utilizing the process when the opportunity presents itself rather than fighting this innovative problem-solving technique. It is through this understanding of the process that the lawyer will improve him or herself and, as a result, become more valuable to his or her clients.